

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED
JUN 03 2002
Michael N. Milby, Clerk

In re ENRON CORPORATION SECURITIES §
LITIGATION §

MARK NEWBY, et al., Individually §
and On Behalf of All Others Similarly §
Situating, §

Plaintiffs, §

- against - §

ENRON CORP., et al., §

Defendants, §

Civil Action No. H-01-3624
(Consolidated)

CLASS ACTION

This Document Relates To: §

RALPH A. WILT, JR., §

Plaintiff, §

- against - §

ANDREW S. FASTOW, KENNETH §
L. LAY, JEFFREY K. SKILLING, §
ET AL., §

Defendants. §

Civil Action No. H-02-0576

CERTAIN DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STRIKE
THE FIRST AMENDED COMPLAINT IN WILT V. FASTOW

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CERTAIN DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STRIKE THE FIRST
AMENDED COMPLAINT IN *WILT V. FASTOW*

Defendant Arthur Andersen, LLP ("Andersen") and the defendants listed in footnote 1 below respectfully submit this reply in further support of their motion to strike the First Amended Complaint ("Amended Complaint") filed on March 28, 2002 in Wilt v. Fastow, No. H-02-0576.¹

PRELIMINARY STATEMENT

On February 18, 2002, this Court issued an order specifically consolidating Wilt with the Newby cases. See Wilt v. Fastow, No. 02-CV-0576, Order of Consolidation (S.D. Tex. Feb. 18, 2002). The Wilt Plaintiffs did not file an objection to consolidation. On the contrary, Plaintiff Ralph A. Wilt, Jr. opposed the motion of Vinson & Elkins, a defendant in Wilt, opposing consolidation of the Wilt case. Wilt v. Fastow, No. H-02-0576, Response of Plaintiff Ralph A. Wilt, Jr., in Support of the Court's Order of Consolidation and in Opposition to the Vinson & Elkins Defendants' Motion to Sever Themselves From the Consolidated Lead Action (S.D. Tex. March 25, 2002). Notwithstanding their purported support for consolidation and in blatant disregard for this Court's consolidated approach to the Enron litigation, the Wilt Plaintiffs filed an amended complaint without coordinating with the court-appointed lead plaintiff, argue that defendants were required to respond to this separate complaint, and

¹The request for relief in this motion is likewise sought by the following parties: Kenneth L. Lay, Jeffrey K. Skilling, Andrew S. Fastow, Richard A. Causey, James V. Derrick, Jr., Mark A. Frevert, Stanley C. Horton, Kenneth D. Rice, Richard B. Buy, Joseph M. Hirko, Ken L. Harrison, Steven J. Kean, Rebecca P. Mark-Jusbasche, Michael S. McConnell, Jeffrey McMahon, Cindy K. Olson, Mark E. Koenig, Kevin P. Hannon, Lawrence Greg Whalley, Robert A. Belfer, Norman P. Blake, Ronnie C. Chan, John H. Duncan, Wendy L. Gramm, Robert K. Jaedicke, Charles A. LeMaistre, Joe H. Foy, John A. Urquhart, Thomas H. Bauer, Debra A. Cash, David Stephen Goddard, Jr., Michael M. Lowther, Michael C. Odom, John E. Stewart, Benjamin S. Neuhausen, Nancy Temple, Roger D. Willard, Michael J. Kopper, Vinson & Elkins, L.L.P., Ronald T. Astin, Joseph Dilg, Michael P. Finch, Max Hendrick III., J. Clifford Baxter, Mark J. Metts, and Paula Rieker.

contend that they alone are entitled to commence discovery.² Accordingly, the Wilt Plaintiffs now effectively argue that the Wilt action should proceed on its own schedule separate and apart from the consolidated Newby cases. Their position, however, is not only inconsistent with their previous endorsement of the consolidation of Wilt with the Newby cases, but also is untimely and entirely inconsistent with the purposes of consolidation and this Court's prior scheduling orders.

ARGUMENT

The Wilt Plaintiffs misconstrue the motion to strike. They contend that defendants are wrongly attempting to deprive them of their entitlement to amend their complaint. However, defendants are merely interested in ensuring that the mass litigation proceeds in an orderly and efficient manner. Indeed, in a separate motion, certain defendants moved for the entry of a preliminary scheduling order specifically providing for amended pleadings in due course. See Newby v. Enron Corp., No. H-01-3624 (Consol.), Motion for Entry of Preliminary Scheduling Order For Complaints Consolidated Into Newby and Pursued by Persons Other Than Court-Appointed Lead Plaintiff at 3 (S.D. Tex. May 8, 2002). Consequently, if the circumstances warrant, the Wilt Plaintiffs can re-file their amended complaint at the appropriate time.

This Court's scheduling order states that it "shall apply to the consolidated Tittle and Newby cases," and clearly provides for the filing of "consolidated complaints." See Newby v. Enron Corp., No. H-01-3624 (Consol.), sch. order at 5 (S.D. Tex. Feb. 27, 2002). It does not address at all the

²The Wilt Plaintiffs arguments concerning their purported entitlement to discovery are set forth in The Wilt Plaintiffs Response and Memorandum of Points and Authorities in Partial Support and Partial Opposition to Motion For Preliminary Scheduling Order in Non-Class Securities Fraud Actions filed on May 22, 2002. Defendants have replied separately to this pleading.

individual actions which are part of those consolidated cases, let alone make any provision for the filing of amended pleadings in any of the individual actions. Notably, the Wilt Plaintiffs never opposed these orders, nor did they seek the right to opt out of the consolidated Newby complaint. Under the Wilt Plaintiffs' interpretation, the plaintiffs in each and every case consolidated with Newby or Tittle, could have filed their own amended complaint, completely undermining the purpose of consolidation. See In re Wirebound Boxes Antitrust Litig., 128 F.R.D. 262, 264 (D. Minn. 1989); In re Equity Funding Corp. of Am. Sec. Litig., 416 F. Supp. 161, 176 (C.D. Cal. 1976) (consolidated complaint appropriate to "avoid unnecessary costs or delays" (quoting Fed. R. Civ. P. 42(a))); Barcelo v. Brown, 78 F.R.D. 531, 536 (D. P.R. 1978) ("The paramount objective of consolidation is the accomplishment of great convenience and economy in the administration of justice. . . . [Rule 42(a)] seeks to avoid overlapping duplication in motion practice, pre-trial, and trial procedures occasioned by competing counsel representing different plaintiffs." (citations omitted)). It has always been anticipated that the consolidated complaints would obviate the need for defendants to respond separately to each action filed. As such, the Wilt Plaintiffs' assertion that they filed their amended complaint in accordance with this Court's scheduling order is unsupportable.

The Wilt Plaintiffs' exclusive reliance on Federal Rule of Civil Procedure 15(a) is also misplaced. Although Rule 15(a) governs amendments, Rule 42 governs consolidation. Rule 42 provides in pertinent part that the court "may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." One rule does not exist in isolation. See, e.g., Prudential Ins. Co. v. Saxe, 134 F.2d 16, 34 (D.C. Cir. 1943) (construing rule 13(a) in light of Rule 42 as "Rule 42 confers on the District Court broad discretionary powers for consolidation of actions involving a

common question of law or fact.”) (internal quotations omitted). Rather, as set forth in Rule 1, the Federal Rules of Civil Procedure “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.” See also Pan American World Airways, Inc., 523 F.2d 1073, 1078-81 (9th Cir. 1975) (construing Rules 21, 23, and 42 in light of Rule 1). Requiring, at least as an initial matter, that defendants respond only to the two consolidated complaints accomplishes this goal. Moreover, the Supreme Court has recognized “the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” Landis v. North American Co., 299 U.S. 248, 254 (1936). In addition, this Court derives power from its designation by the Judicial Panel on Multidistrict Litigation as the host of the Enron-related multidistrict proceedings. See 28 U.S.C. § 1407; see also In re Wirebound Boxes, 128 F.R.D. at 264 (“A consolidated complaint is authorized by Federal Rule of Civil Procedure 42(a) and 28 U.S.C. § 1407(a).”).

The Wilt Plaintiffs argue that nothing precluded plaintiffs Mahoney and Levine from filing their own individual action. That may be true. However, as the Wilt Plaintiffs concede, such action would have been automatically consolidated pursuant to this Court’s original order of consolidation. See Newby v. Enron Corp., No. H-01-3624 (Consol.), Order of Consolidation at 18 (S.D. Tex. Dec. 12, 2001). As such, defendant would not have been expected to respond separately to that action any more than they were expected to respond separately to the Wilt pleadings. The Wilt Plaintiffs erroneously equate the commencement of new actions with the contemplation of multiple operative complaints. Turning logic on its head, the Wilt Plaintiffs attempt to argue that allowing the filing of multiple and separate complaints for the myriad cases which have been consolidated would serve the

goal of efficient adjudication. To the extent that the Wilt Plaintiffs are arguing that only they had a right to file an amended complaint, they do not explain why their case should be treated differently than the rest.

The Wilt Plaintiffs also confuse this Court's reliance on consolidated pleadings with the merger of numerous actions into a single cause. Contrary to the Wilt Plaintiffs' suggestion, defendants have not argued that consolidation eviscerates the individual actions. Rather, the use of consolidated pleadings is merely a tool which enables the court and the parties to effectively manage a mass litigation. See, e.g., In re Wirebound Boxes, 128 F.R.D. at 264 ("parties' rights and defenses are not impermissibly merged by the consolidated complaint"); In re Equity Funding, 416 F. Supp. at 176. That tool, however, is rendered useless when parties are permitted to unilaterally operate on their own schedule in an uncoordinated fashion as the Wilt Plaintiffs have here. "Although the effect of such pretrial consolidation is not and cannot be to merge the suits into a single cause . . . the consolidation of pleadings for pretrial purposes is within the discretionary power of the district court, particularly in the context of complex pretrial proceedings pursuant to 28 U.S.C. § 1407(a)." In re Equity Funding, 416 F. Supp. at 176 (internal quotations and citations omitted); accord Katz v. Realty Equities Corp., 521 F.2d 1354, 1360 (2d Cir. 1975). In its order appointing lead plaintiff, this Court previously held that "Lead Counsel shall henceforth direct and coordinate the prosecution of this action on behalf of *all Plaintiffs' counsel*, including discovery, pretrial conferences, and settlement negotiations with counsel for Defendants." Newby v. Enron Corp., No. H-01-3624 (Consol.), mem. op. at 84 (S.D. Tex. Feb. 15, 2002) (emphasis added). To the extent that the consolidated Newby complaint does not adequately address the claims asserted by the Wilt Plaintiffs, the onus is on those plaintiffs to raise that

issue with lead plaintiff and the Court prior to effectively separating their action from the consolidated proceedings. See Farber v. Riker-Maxson Corp., 442 F.2d 457, 458 (2d Cir. 1971) (“proper function of lead counsel” allows Court to restrict efforts to “bypass [lead counsel] or to participate directly in the case without first requesting [lead counsel] to take the action [plaintiffs’ attorney] suggests, or if [lead counsel] refuses to take such action, first securing the permission of the court to proceed directly”); Barcelo, 78 F.R.D. at 537 (“In the event a particular Plaintiff deems he is being prejudiced by [lead plaintiff’s actions], he may apply to the Court for appropriate relief.”).

Similarly unavailing is the Wilt Plaintiffs’ insistence that their amendments are relatively discrete. It is not the substance of the amendments, but rather the propriety of filing an amended pleading at this juncture that is at issue.³

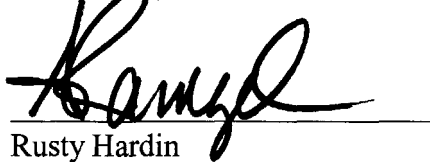
³In the event that the motion to strike is denied, defendants will file motions to dismiss in accordance with a schedule - to be determined by the Court - governing those actions which will proceed outside the confines of the consolidated complaints.

CONCLUSION

For the reasons given above, this Court should enter an order striking the Amended Complaint in Wilt, and granting other relief as may be just and proper.

Dated: Houston, Texas
June 3, 2002

Respectfully submitted,



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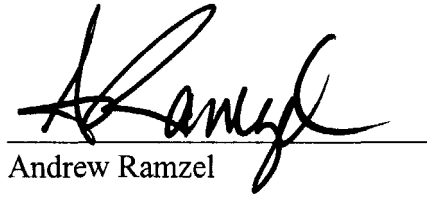
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CERTIFICATE OF SERVICE

I hereby certify that on the 3 day of June, 2002, the foregoing pleading was served on the counsel of record according to the Court's order concerning service.



Andrew Ramzel